Commission interpret "information services" to be coextensive with "enhanced services."[227] Other commenters interpret "information services" to be broader than "enhanced services."[228]

101. Parties disagree about whether "protocol processing" services fall within the statutory definition of "information services."[229] Bell Atlantic and U S West argue that protocol processing services are not information services, because they do not transform or process the content of the information transmitted by the subscriber.[230] In contrast, ITI, ITAA, and Sprint assert that protocol conversion falls within the statutory definition of an information service, because that definition does not specify that such services must transform or process the content of information transmitted.[231]

c. Discussion

102. We conclude that all of the services that the Commission has previously considered to be "enhanced services" are "information services." We are persuaded by the arguments advanced by ITAA, CIX, and others, that the differently-worded definitions of "information

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[227] See, e.g., PacTel at 9; USTA at 16; MCI at 16; Sprint at 16-17; ITAA at 12-14; IIA Reply at 1-3; CIX Reply at 3-4; ITI/ITAA Reply at 15.

[228] See, e.g., BellSouth at 27 n.67 ("information services" include live operator telemessaging services, but "enhanced services" do not, because such services are not "computer processing applications"); AT&T at 12 n.13 (same); U S West at 11-12 ("enhanced services" are limited to those services offered over common carrier transmission facilities used in interstate communications); CIX Reply at 3.

[229] The Common Carrier Bureau previously explained the term "protocol processing" as follows:

> "Protocol" refers to the ensemble of operating disciplines and technical parameters that must be observed and agreed upon by subscribers and carriers in order to permit the exchange of information among terminals connected to a particular telecommunications network. A subscriber's digital transmission necessarily consists of two components: information-bearing symbols and protocol-related symbols. . . . "Protocol processing" is a generic term, which subsumes "protocol conversion" and refers to the use of computers to interpret and react to the protocol symbols as the information contained in a subscriber's message is routed to its destination. "Protocol conversion" is the specific form of protocol processing that is necessary to permit communications between disparate terminals or networks.

IDCMA Petition for a Declaratory Ruling That AT&T's Interspan Frame Relay Service is a Basic Service, Memorandum Opinion & Order, 10 FCC Rcd 13,717, 13,717-18 n.5 (Com. Carrier Bur. 1995) (Frame Relay Order).

[230] Bell Atlantic, Exhibit 1, at 2-3; accord US West at 13. Compare PacTel at 9 (Commission should exclude from the definition of information services the three types of protocol conversion that it does not consider to be enhanced services).

[231] ITI/ITAA Reply at 15-16; Sprint Reply at 10.

services" and "enhanced services" can and should be interpreted to extend to the same functions.[232] We believe that interpreting "information services" to include all "enhanced services" provides a measure of regulatory stability for telecommunications carriers and ISPs alike, by preserving the definitional scheme under which the Commission exempted certain services from Title II regulation. We agree with ISPs that regulatory certainty and continuity benefits both large and small service providers.[233] In sum, we find no basis to conclude that by using the MFJ term "information services" Congress intended a significant departure from the Commission's usage of "enhanced services."

103. We also find, however, that the term "information services" includes services that are not classified as "enhanced services" under the Commission's current rules. Stated differently, we conclude that, while all enhanced services are information services, not all information services are enhanced services. As noted by U S West, "enhanced services" under Commission precedent are limited to services "offered over common carrier transmission facilities used in interstate communications," whereas "information services" may be provided, more broadly, "via telecommunications."[234] Further, we agree with BellSouth and AT&T that live operator telemessaging services that do not involve "computer processing applications" are information services, even though they do not fall within the definition of "enhanced services."[235]

104. We further conclude that, subject to the exceptions discussed below, protocol processing services constitute information services under the 1996 Act. We reject Bell Atlantic's argument that "information services" only refers to services that transform or process the content of information transmitted by an end-user, because we agree with Sprint that the statutory definition makes no reference to the term "content," but requires only that an information service transform or process "information."[236] We also agree with ITI and ITAA that an end-to-end protocol conversion service that enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly "transforms" user information.[237] We further find that other types of protocol processing services that interpret and react to protocol information associated with the transmission of end-user content clearly "process" such information. Therefore, we conclude that both protocol conversion and protocol processing services are information services under the 1996 Act.

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[232] See ITAA at 13-14; CIX Reply at 3-4.

[233] Cf. ITAA at 14; IIA Reply at 1-3; ITI/ITAA Reply at 18.

[234] U S West at 11-12.

[235] See infra part III.G.2.

[236] See Bell Atlantic, Exhibit 1, at 2; Sprint Reply at 10.

[237] See ITI/ITAA Reply at 17.

105. This interpretation is consistent with the Commission's existing practice of treating end-to-end protocol processing services as enhanced services.[238] We find no reason to depart from this practice, particularly in light of Congress's deregulatory intent in enacting the 1996 Act.[239] Treating protocol processing services as telecommunications services might make them subject to Title II regulation. Because the market for protocol processing services is highly competitive, such regulation is unnecessary to promote competition, and would likely result in a significant burden to small independent ISPs that provide protocol processing services. Thus, policy considerations support our conclusion that end-to-end protocol processing services are information services.[240]

106. We note that, under Computer II and Computer III, we have treated three categories of protocol processing services as basic services, rather than enhanced services, because they result in no net protocol conversion to the end-user. These categories include protocol processing: 1) involving communications between an end-user and the network itself (e.g., for initiation, routing, and termination of calls) rather than between or among users; 2) in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE); and 3) involving internetworking (conversions taking place solely within the carrier's network to facilitate provision of a basic network service, that

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[238] See Bell Operating Companies Joint Petition for Waiver of Computer II Rules, Order, 10 FCC Rcd 13,758, 13,766, ¶ 51 and 13,770-13,774, app. A (1995) (BOC CEI Plan Approval Order) (approving PacTel CEI plan for provision of enhanced protocol processing services, as well as CEI plan amendments by Bell Atlantic, BellSouth, SWBT, and U S West); see e.g., The Ameritech Operating Companies Plan to Provide Comparably Efficient Interconnection to Providers of Enhanced Protocol Processing Services, Memorandum Opinion & Order, 5 FCC Rcd 3231 (Com. Car. Bur. 1990); New England Telephone and Telegraph Company and New York Telephone Company Plan to Provide Comparably Efficient Interconnection to Providers of Enhanced Protocol Processing Services, Memorandum Opinion & Order, 5 FCC Rcd 56 (Com. Car. Bur. 1990); South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company Plan for Comparably Efficient Interconnection of Enhanced Services Providers for Synchronous Protocol Processing Services, Memorandum Opinion & Order, 4 FCC Rcd 6825 (Com. Car. Bur. 1989).

[239] We observe that the arguments raised by Bell Atlantic and U S West in favor of treating protocol processing services as telecommunications services are quite similar to arguments that the Commission considered and rejected nearly ten years ago in the Computer III Phase II Order, which affirmed the status of protocol processing as an enhanced service. See Computer III Phase II Order, 2 FCC Rcd at 3078, ¶ 43. In that decision, the Commission found, among other things, that protocol processing services were being effectively provided on a competitive, unregulated basis, and that reclassifying such services as basic services could cloud the regulatory boundary between basic and enhanced services.

[240] To the extent that BOCs suggest that the section 272 separate affiliate requirements will impair their provision of protocol processing services, we note that under our Computer III rules, they may continue to provide intraLATA protocol processing services on an integrated basis, pursuant to a CEI plan that has been approved by the Commission. We agree with ITI and ITAA that requiring the BOCs to provide interLATA protocol processing service through a section 272 separate affiliate merely requires them to negotiate the same organizational boundaries and service integration issues that their ISP competitors routinely face. See ITI/ITAA Reply at 18-19.

result in no net conversion to the end-user).[241] We agree with PacTel that analogous treatment should be extended to these categories of "no net" protocol processing services under the statutory regime.[242] Because "no net" protocol processing services are information service capabilities used "for the management, control, or operation of a telecommunications system or the management of a telecommunications service," they are excepted from the statutory definition of information service.[243] Thus, "no net" protocol conversion services constitute telecommunications services, rather than information services, under the 1996 Act.

107. We further find, as suggested by PacTel, that services that the Commission has classified as "adjunct-to-basic" should be classified as telecommunications services, rather than information services.[244] In the NATA Centrex order, the Commission held that the enhanced services definition did not encompass adjunct-to-basic services.[245] Although the latter services may fall within the literal reading of the enhanced service definition, they facilitate establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service. Similarly, we conclude that "adjunct-to-basic" services are also covered by the "telecommunications management exception" to the statutory definition of information services, and therefore are treated as telecommunications services under the 1996 Act.

2. Distinguishing InterLATA Information Services subject to Section 272 from IntraLATA Information Services

a. Background

108. In the Notice, we sought comment on how to distinguish between interLATA information services, which are subject to the section 272 separate affiliate requirements, and

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[241] Frame Relay Order, 10 FCC Rcd at 13,719, ¶¶ 14-16; Computer III Phase II Order, 2 FCC Rcd at 3081-82, ¶¶ 64-71. An example of the third type of protocol conversion occurs when a carrier converts from X.25 to X.75 formatted data at the originating end within the network, transports the data in X.75 format, and then converts the data back to X.25 format at the terminating end.

[242] PacTel at 9.

[243] See 47 U.S.C. § 153(20).

[244] PacTel at 9. PacTel argues that such treatment of "adjunct-to-basic" services would correspond to the statutory definition of information services, which "does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20); see also U S West at 13.

[245] NATA Centrex Order, 101 FCC 2d at 359-361, ¶¶ 24-28. Adjunct-to-basic services include, inter alia, speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller i.d., call tracing, call blocking, call return, repeat dialing, and call tracking, as well as certain Centrex features.

intraLATA information services, which are not.[246] In particular, we asked whether an information service should be considered an interLATA service only when the service actually involves an interLATA telecommunications transmission component, or, alternatively, when it potentially involves interLATA telecommunications transmissions (e.g., the service can be accessed across LATA boundaries).[247] We further sought comment regarding how the manner in which a BOC structures its provision of an information service may affect whether the service is classified as interLATA.[248]

109. We also invited comment on whether a particular service for which a BOC had applied for or received an MFJ waiver should presumptively be treated as an interLATA information service subject to the separate affiliate requirements of section 272.[249] In addition, we sought comment on whether we should presume that services provided by BOCs pursuant to CEI plans approved by the Commission prior to the enactment of the 1996 Act are intraLATA information services.[250]

b. Comments

110. InterLATA Transmission/Resale. The BOCs, AT&T, and MCI argue that, for an information service to be considered an interLATA information service, the BOC must provide as a necessary component thereof telecommunications between a point located in one LATA and a point outside that LATA.[251] Certain of the BOCs argue that only interLATA information services in which the BOC's own facilities or services carry the information service across LATA boundaries are subject to section 272 separate affiliate requirements; services in which the interLATA telecommunications transmission component is provided through resale are not subject to section 272.[252] USTA argues that BOC provision of interLATA transmission through resale

[246] Notice at ¶ 44.

[247] Id. at ¶ 44.

[248] Id. at ¶ 45. For example, we asked whether an interLATA information service required non-transmission computer facilities used in the provision of the service located in a different LATA from the end-user, or non-transmission facilities located in different LATAs.

[249] Id. at ¶ 46.

[250] Id. at ¶ 47.

[251] Ameritech at 67-69; AT&T at 13-14; Bell Atlantic, Exhibit 1, at 3-5; BellSouth at 25; MCI at 17; NYNEX at 42-45; PacTel at 10; U S WEST at 9; Bell Atlantic Reply at 15-17; NYNEX Reply at 27-28.

[252] Bell Atlantic, Exhibit 1, at 3-5; see also U S West at 9; USTA at 14; Ameritech Reply at 34; U S West Reply at 29. But see Bell Atlantic Reply at 16 (arguing that interLATA information services are those services that a BOC or its affiliate carries across LATA boundaries, either through its own facilities, or via facilities it leases and resells as its own).

does not raise improper cost allocation and discrimination concerns.[253] In contrast, several potential telecommunications competitors argue that, in accordance with MFJ precedent, BOC provision of an information service with an interLATA transmission component is an interLATA information service, regardless of whether transmission is provided over resold facilities or the BOC's own facilities.[254]

111. InterLATA Access. AT&T and the BOCs argue that an information service may not be considered interLATA merely because it may be accessed on an interLATA basis by means independently chosen by the customer, such as the services of the customer's presubscribed interexchange provider.[255] In contrast, several potential telecommunications competitors and ISPs urge the Commission to define interLATA information services to include any information service that is capable of being accessed across LATA boundaries.[256]

112. Bundling. AT&T and several of the BOCs assert that an information service is only subject to the section 272 separate affiliate requirement if the interLATA telecommunications transmission component is a bundled component of the information service.[257] The BOCs further state that where an interLATA telecommunications service and information service are separately purchased, even if both services are provided by the BOC or its affiliate, they should not be treated together as an interLATA information service.[258] MCI conditionally agrees with that position.[259]

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[253] USTA at 14; USTA Reply at 17.

[254] AT&T Reply at 4 n.6 (citing United States v. Western Electric, 907 F.2d 160, 163 (D.C. Cir. 1990)); see also MCI at 17; MFS Reply at 9.

[255] E.g., AT&T at 14; Bell Atlantic, Exhibit 1, at 4; BellSouth at 25; NYNEX at 43-44; PacTel at 12; U S West at 9-10; Ameritech Reply at 33-34; Bell Atlantic Reply at 15-16; BellSouth Reply at 23; PacTel Reply at 5; U S West Reply at 27-28.

[256] E.g., ITAA at 9-10 (arguing that information services capable of providing access to or being accessed by interLATA facilities should be classified as interLATA information services); Sprint at 17-18; TRA at 11-12; ITI/ITAA Reply at 7-8; see also VoiceTel at 11-12; MFS Reply at 12-13.

[257] NYNEX at 43, 45; Ameritech at 67 (specifying that the interLATA transmission service and the information service must be provided together for a single charge); see also AT&T at 13-14.

[258] NYNEX at 43; U S West at 9-10; accord BellSouth at 25.

[259] MCI Reply at 10-11 (the BOC must provide the interLATA telecommunications service through a section 272 affiliate, after having obtained Commission authorization under section 271); see also MFS Reply at 9 (customer must establish an independent relationship with interLATA telecommunications carrier). But see Time Warner Reply at 7-8 (arguing that allowing BOCs separately to provide intraLATA information service and interLATA transmission would permit them to circumvent Congress's clear separate affiliate requirement).

113. Remote Databases/Network Efficiency. Several of the BOCs argue that certain interLATA information services should not be subject to the section 272 separate affiliate requirements. For example, they argue that information services in which the BOC locates a non-transmission database or processor in another LATA are not interLATA information services subject to section 272, but are incidental interLATA services, pursuant to section 271(g)(4).[260] They also contend that, where an information service involves interLATA transmission that is provided outside the control of the user solely to incorporate network efficiencies, that information service is excluded from the definition of interLATA information services.[261]

114. Presumptions Regarding Previously Authorized Information Services. Certain BOCs argue that we should presume that BOC provision of an information service without an MFJ waiver (i.e., pursuant to a CEI plan) is an intraLATA service.[262] MCI and TRA argue that, when a BOC has sought or obtained an MFJ waiver to provide an information service prior to enactment of the 1996 Act, that information service should be presumed to be interLATA.[263]

c. Discussion

115. InterLATA Transmission/Resale. We conclude that, as used in section 272, the term "interLATA information service" refers to an information service that incorporates as a necessary, bundled element an interLATA telecommunications transmission component, provided to the customer for a single charge.[264] We find, as noted in the comments of AT&T, MCI, and the BOCs, that this definition of interLATA information service conforms to the MFJ precedent in this area.[265] We further conclude that a BOC provides an interLATA information service when

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[260] Bell Atlantic, Exhibit 1, at 5; see also Ameritech at 67-68; BellSouth Reply at 23-24. But see MCI Reply at 9-10; Sprint Reply at 10.

[261] BellSouth at 25; see also U S West at 10; PacTel at 10-11; PacTel Reply at 6. PacTel notes that, under the MFJ, a BOC could route exchange and exchange access traffic outside the LATA in which it originated for call processing (switching and screening) so long as the traffic returned to the original LATA for termination or delivery to an interexchange provider's point of presence. PacTel at 10-11.

[262] NYNEX at 45 n.61; Bell Atlantic, Exhibit 1, at 4; U S West at 21. But see MFS Reply at 15 (satisfaction of the CEI requirements is irrelevant to classification of services as interLATA or intraLATA).

[263] MCI at 17; TRA at 11-12.

[264] An interLATA transmission component is "necessary" to an interLATA information service if it must be used in order for the end-user to make use of the information service capability. For example, a BOC may provide data storage and retrieval services to customers throughout its service region, using one centralized computer data storage facility and dedicated interLATA transmission links that connect the end-user with the data storage facility. In this case, the dedicated interLATA transmission links are "necessary" to the BOC's provision of centralized, interLATA data storage and retrieval services.

[265] See United States v. Western Electric, 907 F.2d 160, 163 (D.C. Cir. 1990) ("[W]hen information services are . . . bundled with leased interexchange lines, the activity is covered by the [AT&T Consent] decree.")

it provides the interLATA telecommunications transmission component of the service either over its own facilities, or by reselling the interLATA telecommunications services of an interexchange provider. This conclusion also comports with MFJ precedent.[266]

116. USTA contends that BOC provision of interLATA transmission through resale should be permitted because it does not raise improper cost allocation and discrimination concerns.[267] This argument, however, does not address the key issue of what is required by the statute. As discussed above, we find that section 601(a) of the 1996 Act indicates that Congress intended the provisions of the 1996 Act to supplant the MFJ.[268] Therefore, we conclude that the restrictions imposed by the 1996 Act on BOC provision of interLATA services, like the interLATA restrictions imposed under the MFJ, apply to services provided through resale, as well as to services provided through the BOC's own transmission facilities. Moreover, we decline to adopt PacTel's suggestion that end-user receipt of an "interLATA benefit" should be the test for determining whether an information service is interLATA.[269] PacTel's proposed test is inconsistent with MFJ precedent and would be very difficult to administer. Finally, we reject the arguments raised by Sprint and MFS that we should classify all information services as interLATA services because of the difficulties inherent in distinguishing between interLATA and intraLATA information services.[270] We conclude that it is possible to distinguish between interLATA and intraLATA information services by applying the rule established by this Order.

117. InterLATA Access. We agree with AT&T and the BOCs that an information service may not be considered interLATA merely because it may be accessed on an interLATA basis by means independently chosen by the customer, such as a presubscribed interexchange carrier. In interpreting the statutory restrictions on BOC provision of interLATA information services, we are concerned not with the manner in which an information service is used, but rather with the components of the service that are provided by the BOC. When a BOC is neither

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[266] See United States v. Western Electric, 907 F.2d at 163 ("We do not agree . . . that a distinction should be drawn between leasing lines, on the one hand, and acquiring or constructing them, on the other. A taxi company, for instance, offers taxi service for hire whether or not it owns or leases its cabs. The critical distinction under the decree, is not whether the BOC owns the interexchange capacity, but whether it 'provide[s]' interexchange service to its customers.")

[267] USTA Reply at 17.

[268] See supra paragraph 31.

[269] PacTel at 11-12. PacTel's example of a service that should be classified as an intraLATA information service, because it provides no direct interLATA benefit to the end-user, is a gateway service located in a distant LATA used by a San Francisco end-user to obtain information from San Francisco area libraries. PacTel's example of an information service that provides a direct interLATA benefit to the end-user is an e-mail service that allows exchange of messages between users in different LATAs.

[270] Sprint at 17-18; MFS Reply at 12-13 (because major ISPs do not provide intraLATA-only information services, the Commission should declare that all BOC information services are interLATA); see also VoiceTel at 11; ITI/ITAA Reply at 7-8.

providing nor reselling the interLATA transmission component of an information service that may be accessed across LATA boundaries, the statute does not require that service to be provided through a section 272 separate affiliate. We reject MFS's contention that, where an interLATA transmission service is necessary for a customer to obtain access to a particular BOC-provided information service, that information service should be considered interLATA, even if the necessary interLATA transmission component is separately provided by another carrier.[271] In such circumstances, the BOC is not providing any interLATA services, and therefore is not required by section 272 to provide the information service in question through a separate affiliate.

118. Moreover, as the BOCs point out, if we were to determine that the mere possibility of interLATA access was sufficient to classify an information service as an interLATA service, that rule would render any telecommunications service that carries traffic that originates in one LATA and terminates in another, including local exchange service and exchange access service, an interLATA service.[272] Congress clearly did not intend that result.

119. In addition, we agree with the BOCs that classifying information services as interLATA solely because end-users may obtain access to the service across LATA boundaries would represent a significant departure from Commission precedent, as well as from MFJ precedent.[273] BOCs are currently providing a number of information services on an integrated basis pursuant to the Commission's Computer III regulations, and users may obtain access to some, if not all, of these services on an interLATA basis.[274] If we were to determine that these services were interLATA services simply because end-users may obtain access across LATA boundaries, BOCs would have to change the manner in which they are providing many of these services, which would likely result in lost efficiency and disruption of services to customers.[275] We see no basis in the statute to adopt such an interpretation, as sections 271 and 272 are intended to govern the BOCs' provision of services that they were previously prohibited from providing under the MFJ, not services that they were previously authorized to provide under the MFJ.

120. Bundling. As we concluded above, an interLATA information service incorporates a bundled interLATA telecommunications transmission component. When a customer obtains interLATA transmission service from an interexchange provider that is not affiliated with a BOC,

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[271] See MFS Reply at 9.

[272] NYNEX at 43; U S West at 10; Ameritech Reply at 33-34; Bell Atlantic Reply at 15-16.

[273] E.g., Bell Atlantic, Exhibit 1, at 4-5; PacTel at 10-11 (under the MFJ, if a necessary interLATA transmission component of an information service is provided by an interexchange carrier that is not selected by the BOC, the service would not be considered a BOC-provided interLATA information service); see also Ameritech Reply at 33.

[274] See BOC CEI Plan Approval Order, 10 FCC Rcd at 13,770-74, app. A.

[275] See, e.g., Bell Atlantic, Exhibit 1, at 4-5.

the use of that transmission service in conjunction with an information service provided by a BOC or its affiliate does not make the information service a BOC interLATA service offering. A customer also may obtain an in-region interLATA telecommunications service from a BOC section 272 affiliate that the customer uses in conjunction with an intraLATA information service provided by that affiliate or by the BOC itself. When such telecommunications and information services are provided, purchased, and priced separately, we conclude that they do not collectively constitute an interLATA information service offering by the BOC.[276] In such a situation, the BOC would, of course, be required to provide the in-region interLATA transmission service pursuant to section 271 authorization and the section 272 separate affiliate and nondiscrimination requirements. The BOC could choose to provide the separate, intraLATA information service either on an integrated basis, in compliance with the Commission's CEI and ONA requirements, or through a separate affiliate.

121. Remote Databases/Network Efficiency. BOCs may not provide interLATA services in their own regions, either over their own facilities or through resale, before receiving authorization from the Commission under section 271(d). Therefore, we conclude that BOCs may not provide interLATA information services, except for information services covered by section 271(g)(4), in any of their in-region states prior to obtaining section 271 authorization. Section 271(g)(4) designates as an incidental interLATA service the interLATA provision by a BOC or its affiliate of "a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA."[277] Because BOCs were able to provide incidental interLATA services immediately upon enactment of the 1996 Act, they may provide interLATA information services that fall within the scope of section 271(g)(4) without receiving section 271(d) authorization from the Commission. Since section 271(g)(4) services are not among the incidental interLATA services exempted from section 272 separate affiliate requirements, however, they must be provided in compliance with those requirements. To the extent that parties have argued in the record that centralized data storage and retrieval services that fall within section 271(g)(4) either are not interLATA information services, or are not subject to the section 272 separate affiliate requirements, we specifically reject these arguments.[278]

122. We also reject the BOCs' argument that their use of interLATA transmission, outside the control of the end-user and solely to maximize network efficiencies, in connection with the provision of an information service, does not render that information service interLATA

[276] We note that even when an information service and interLATA transmission service are ostensibly separately priced, if the BOC offers special discounts or incentives to customers that take both services, this would constitute sufficient evidence of bundling to render the information service an interLATA information service.

[277] 47 U.S.C. § 271(g)(4).

[278] E.g., Bell Atlantic, Exhibit 1, at 5; see also Ameritech at 67; BellSouth Reply at 23-24.

in nature.[279] Whenever interLATA transmission is a component of an information service, that service is an interLATA information service, unless the end-user obtains that interLATA transmission service separately, e.g., from its presubscribed interexchange provider. To the extent that BOCs are allowed to perform certain interLATA call processing functions associated with their provision of telephone exchange service or exchange access service in connection with an intraLATA information service, however, they may continue to do so without transforming that information service into an interLATA information service.[280]

123. We also reject PacTel's claim that a BOC's use of interLATA transmission solely for its own business convenience in providing an information service falls within the "telecommunications management exception" to "information service."[281] We disagree with PacTel's assertion that this practice is covered by the "technical management exception," because the BOC would be providing interLATA transmission in connection with the management of an information service, not "the management of a telecommunications service," as specified by section 3(20). Further, as noted above, we believe that the "telecommunications management exception" is analogous to the Commission's classification of certain services as "adjunct-to-basic;" that is, it covers services that may fit within the literal reading of the information services definition, but that are used to facilitate the provision of a basic telecommunications transmission service, without altering the character of that service.[282] In other words, the "technical management exception" relates to the classification of services as either telecommunications services or information services; it has no bearing upon the classification of either of these types of services as intraLATA or interLATA. As such, the "telecommunications management exception" provides no safe harbor for interLATA transmission services employed by BOCs in connection with the provision of information services.

124. Presumptions Regarding Previously Authorized Information Services. With respect to information services that the BOCs were authorized to provide prior to passage of the 1996 Act, we conclude that as a matter of administrative convenience it is helpful to establish several

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[279] PacTel at 10-11; PacTel Reply at 6; see also BellSouth at 25; U S West at 10.

[280] For example, under the MFJ, BOCs were permitted to use interLATA "Official Services Networks" to perform on a centralized basis certain network functions associated with their provision of exchange and exchange access services, including trunk and switch monitoring and control, call routing, directory assistance, repair calls, and internal business communications. See United States v. Western Electric, 569 F. Supp. 1057, 1097-1101 (D.D.C. 1983). Although BOCs were entitled to provide out-of-band signalling associated with their own exchange services on a centralized basis, the MFJ court denied their request to furnish such signalling to interexchange carriers on a centralized basis, instead requiring them to establish interconnection with their signal transfer points (STPs) in each LATA. See United States v. Western Electric, 131 F.R.D. 647 (D.D.C. 1990), aff'd, 969 F.2d 1231 (D.C. Cir. 1992). Under the 1996 Act, the BOCs are now entitled to provide signaling information associated with both intraLATA services and interLATA services on a centralized basis. See 47 U.S.C. §§ 271(g)(5) and (g)(6).

[281] PacTel at 10-11 (citing 47 U.S.C. § 153(20)).

[282] See supra paragraph 107.

rebuttable presumptions regarding intraLATA or interLATA classification. Thus, we will presume that information services that BOCs were authorized to provide pursuant to CEI plans, without MFJ waivers, are intraLATA information services. Similarly, we will presume that information services for which BOCs were required to obtain MFJ waivers are interLATA information services. We conclude that these presumptions are rebuttable, rather than conclusive, because the BOCs have noted that, for expediency purposes, they sometimes requested and obtained MFJ waivers in order to provide services that were not clearly interLATA in nature.[283] Thus, a BOC would be able to rebut the presumption that an information service provided pursuant to an MFJ waiver is an interLATA information service by showing that it had obtained a waiver to provide the service on an intraLATA basis prior to 1991. Similarly, the presumption that an information service provided pursuant to a CEI plan is an intraLATA information service may be rebutted by a showing that the information service incorporates a bundled, interLATA telecommunications transmission component, as specified in this Order.

3. BOC-provided Internet Access Services

a. Background

125. On June 6, 1996, the Common Carrier Bureau (Bureau) released an order approving a CEI plan filed by Bell Atlantic for the provision of Internet Access Service.[284] MFS had filed comments opposing Bell Atlantic's plan, arguing, inter alia, that Bell Atlantic's Internet access service offering is an interLATA service that Bell Atlantic may only provide through a section 272 affiliate after obtaining section 271 authorization from the Commission.[285] Following release of the Bell Atlantic CEI Plan Order, MFS filed a petition for reconsideration of that Order, raising similar arguments.[286] At about the same time, Southwestern Bell Telephone Company (SWBT) filed a CEI plan for Internet Support Services.[287] On July 25, 1996, one week after the Commission released the Notice in this proceeding, MFS filed with the Commission a petition seeking to consolidate proceedings related to the Bell Atlantic CEI Plan Order

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[283] NYNEX at 45 n.61; Ameritech at 69 (noting that prior to 1991, BOCs required MFJ waivers to provide information services at all, even on an intraLATA basis); PacTel Reply at 6-7.

[284] Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Internet Access Services, Order, 11 FCC Rcd 6919 (Com. Car. Bur. 1996) (Bell Atlantic Internet Access CEI Plan Order).

[285] See Bell Atlantic Internet Access CEI Plan Order at ¶ 48 (citing Comments of MFS Communications Company, Inc., at 8 (filed April 12, 1996)).

[286] Petition for Reconsideration of MFS Communications Company, Inc., CCBPol 96-09, at 12-20 (filed July 3, 1996). This petition was subsequently put on public notice by the Bureau. See Pleading Cycle Established on MFS Communications Company Inc.'s Petition for Reconsideration, CCBPol 96-09, Public Notice, DA 96-1102 (rel. Jul. 10, 1996).

[287] See Pleading Cycle Established for Comments on SWBT's Comparably Efficient Interconnection Plan for Internet Support Services, CC Docket Nos. 85-229, 90-623 & 95-20, Public Notice, DA 96-1031 (rel. June 26, 1996).

reconsideration and the SWBT Internet support CEI plan with the instant proceeding, on the grounds that the three proceedings raise similar novel, policy, factual, and legal arguments.[288] Although the Notice in the instant proceeding did not specifically seek comment on the proper classification or regulatory treatment of BOC-provided Internet services and Internet access services under the 1996 Act, several parties discussed these matters in their comments, in the course of addressing how we should define "interLATA information services."

b. Comments

126. MFS argues that all Internet services are interLATA services and, hence, Internet services provided by the BOCs are interLATA information services subject to the section 272 separate affiliate requirements.[289] In response, the BOCs argue that it is possible for them to provide on an intraLATA basis an Internet access service that allows a customer to connect to an Internet service provider's point of presence (POP) using the traditional local loop, and that such service should be classified as an intraLATA information service.[290]

c. Discussion

127. The preceding sections of this Order establish a definition of "interLATA information service" that should assist the BOCs and other interested parties in determining the types of information services that the BOCs are statutorily-required to provide through section 272 affiliates. If a BOC's provision of an Internet or Internet access service[291] (or for that matter, any information service) incorporates a bundled, in-region, interLATA transmission component provided by the BOC over its own facilities or through resale, that service may only be provided through a section 272 affiliate, after the BOC has received in-region interLATA authority under section 271. We believe that this is not the appropriate forum for considering whether the various specific Internet services provided by the BOCs are "interLATA information services" because such determinations must be made on a case-by-case basis. We believe that the lawfulness of the specific Internet services provided by Bell Atlantic and SWBT is more appropriately analyzed in the context of the separate CEI plan proceedings regarding each service that are currently pending before the Bureau, consistent with the rules and policies enunciated in

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[288] Petition to Consolidate Proceedings by MFS Communications Company, Inc. (filed July 25, 1996).

[289] MFS at 7-9, 11-12; MFS Reply at 10-12; see also ITAA at 12 n.31.

[290] U S West at 11; Ameritech Reply at 34; PacTel Reply at 7-8; USTA Reply at 17; SBC Reply at 35-36; U S West Reply at 25-26.

[291] The Internet is an interconnected global network of thousands of interoperable packet-switched networks that use a standard protocol, Transmission Control Protocol/Internet Protocol (TCP/IP), to enable information exchange. See Universal Service Joint Board Recommended Decision at ¶ 457. An end-user may obtain access to the Internet from an Internet service provider, by using dial-up or dedicated access to connect to the Internet service provider's processor. The Internet service provider, in turn, connects the end-user to an Internet backbone provider that carries traffic to and from other Internet host sites.

this rulemaking proceeding. Therefore, we deny MFS's request to consolidate proceedings related to the provision of Internet and Internet access services by Bell Atlantic and SWBT with the instant proceeding.

4. Impact of the 1996 Act on the Computer II, Computer III, and ONA requirements

a. Background

128. In the Notice, we concluded that, because the 1996 Act does not establish regulatory requirements for BOC provision of intraLATA information services, Computer II,[292] Computer III,[293] and ONA[294] requirements continue to govern BOC provision of these services, to the extent that these requirements are consistent with the 1996 Act.[295] We sought comment on which of the Commission's existing requirements were inconsistent with, or had been rendered unnecessary by, the 1996 Act, as well as on the specific provisions of the 1996 Act that supersede the existing requirements.[296] We also sought comment on the impact of the statute on our pending Computer III Further Remand Proceedings.[297]

b. Comments

129. Consistency of Commission's Computer II, Computer III, and ONA Rules with the 1996 Act. Bell Atlantic and NYNEX argue that enactment of the 1996 Act has rendered the Computer II, Computer III, and ONA rules unnecessary and redundant.[298] The majority of the BOCs, however, contend that the Commission's existing Computer III and ONA interconnection

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[292] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980) (Computer II Final Order), recon., 84 FCC 2d 50 (1980) (Computer II Reconsideration Order), further recon., 88 FCC 2d 512 (1981) (Computer II Further Reconsideration Order), affirmed sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

[293] See supra note 217 for full citation for Computer III proceeding.

[294] See Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988) (BOC ONA Order), recon., 5 FCC Rcd 3084 (1990) (BOC ONA Reconsideration Order); 5 FCC Rcd 3103 (1990) (BOC ONA Amendment Order), erratum, 5 FCC Rcd 4045, pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993), recon., 8 FCC Rcd 97 (1993) (BOC ONA Amendment Reconsideration Order); 6 FCC Rcd 7646 (1991) (BOC ONA Further Amendment Order); 8 FCC Rcd 2606 (1993) (BOC ONA Second Further Amendment Order), pet. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993) (collectively referred to as the ONA Proceeding).

[295] Notice at ¶ 48-49.

[296] Id. at ¶¶ 49-50.

[297] Computer III Further Remand Proceedings, 10 FCC Rcd at 8360.

[298] Bell Atlantic, Exhibit 1, at 5-6; NYNEX at 47-48; see also LDDS Worldcom at 12 n.10.

and unbundling requirements are consistent with the 1996 Act and should remain in place to allow them to provide intraLATA information services on an integrated basis.[299] Several of the BOCs' potential telecommunications competitors and certain organizations representing ISPs also agree that the Computer III and ONA safeguards should be retained if the Commission continues to permit BOCs to provide intraLATA information services on an unseparated basis.[300]

130. Requiring section 272 affiliates for intraLATA information services. MCI, ITAA, and CIX argue that, in the interest of regulatory consistency, the Commission should require the BOCs to provide all information services through a section 272 separate affiliate.[301] Several of the BOCs object to this proposal on the ground that such a requirement would be directly contrary to congressional intent.[302]

131. Application of Computer II, Computer III, and ONA requirements to section 272 affiliate activities. Several of the BOCs argue that the Commission should not apply the Computer III and ONA requirements to any BOC information services provided through a section 272 separate affiliate (either interLATA information services, as required by statute, or intraLATA information services, provided on a separate basis by choice).[303] In contrast, ITI and ITAA argue that the Computer III and ONA requirements should be applied to section 272 affiliates, prohibiting such affiliates from bundling equipment or information services with local exchange, exchange access, or interLATA services, until local exchange markets become fully competitive.[304]

c. Discussion

132. Consistency of Commission's Computer II, Computer III, and ONA Rules with the 1996 Act. We conclude that the Computer II, Computer III, and ONA requirements are consistent with the 1996 Act, and continue to govern BOC provision of intraLATA information services. By its terms, the 1996 Act imposes separate affiliate and nondiscrimination requirements on BOC provision of "interLATA information services," but does not address BOC

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[299] BellSouth at 27-28; PacTel at 13; SBC at 13-17; U S West at 20; USTA at 15-16; Bell Atlantic Reply at 17; PacTel Reply at 14-15.

[300] TRA at 12; MCI at 17, 19-20; Sprint at 18-19; MCI Reply at 13; cf. ATSI at 8-13 (arguing that a minimum set of interconnection points and unbundled elements should be made available to information service providers).

[301] Compare MCI at 19; ITAA at 11-12; MCI Reply at 14; CIX Reply at 6-7; with U S West at 20-21 (arguing that the Commission should harmonize the Computer III and ONA requirements with the provisions of the 1996 Act, to develop a single regulatory structure for the provision of information services).

[302] BellSouth at 26-28; PacTel at 13.

[303] U S West at 20; USTA at 15; SBC Reply at 12-14; YPPA Reply at 5.

[304] ITI/ITAA Reply at 11-12.

provision of intraLATA information services.[305] We concluded above that, for the purposes of applying sections 271 and 272, interLATA information services must include a bundled interLATA transmission component.[306] We further conclude, in light of our definition of interLATA information services, that BOCs are currently providing a number of information services on an intraLATA basis.[307] We find that the BOCs may continue to provide such intraLATA information services on an integrated basis, in compliance with the nonstructural safeguards established in Computer III and ONA.[308]

133. We reject Bell Atlantic's conclusory assertions that the 1996 Act's customer proprietary network information (CPNI), network disclosure, nondiscrimination, and accounting provisions supersede various of the Commission's Computer III nonstructural safeguards.[309] We also reject NYNEX's claim that the section 251 interconnection and unbundling requirements render the Commission's Computer III and ONA requirements unnecessary.[310] Based on our review of the record in this proceeding, we conclude that the pending Computer III Further Remand Proceedings are the appropriate forum in which to examine the necessity of retaining any or all of these individual Computer III and ONA requirements.[311] We therefore plan to issue a Further Notice in that proceeding to determine how to regulate BOC provision of intraLATA information services in light of the 1996 Act.

134. In the interim, the Commission's Computer II, Computer III, and ONA rules are the only regulatory means by which certain independent ISPs are guaranteed nondiscriminatory

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[305] See 47 U.S.C. § 272(a)(2)(C).

[306] See supra part III.F.2.

[307] See BOC CEI Plan Approval Order, 10 FCC Rcd at 13,770-74, app. A.

[308] BOCs currently provide intraLATA information services on an integrated basis pursuant to service-specific CEI plans. See Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, 10 FCC Rcd 1724 (1995) (Interim Waiver Order). Contrary to the assertions of MCI and ITAA (see MCI at 18; ITAA at 11 & n.30), we concluded that California III returned the regulation of information services not to a Computer II structural separation regime, but rather to a Computer III service-specific CEI plan regime. BOC CEI Plan Approval Order, 10 FCC Rcd at 13,762, ¶ 22 (1995).

[309] See Bell Atlantic, Exhibit 1, at 6.

[310] See NYNEX at 47-48.

[311] We have already initiated a proceeding in which we are examining which, if any, of the Commission's CPNI requirements should be retained in light of the CPNI restrictions set forth in section 222. See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Notice of Proposed Rulemaking, 11 FCC Rcd 12,513 (1996) (CPNI NPRM).

access to BOC local exchange services used in the provision of intraLATA information services.[312] As noted above, the section 272 nondiscrimination requirements do not apply to BOC provision of intraLATA information services, and ISPs that are not telecommunications carriers cannot obtain interconnection or access to unbundled elements under section 251.[313] Thus, we believe that continued enforcement of these safeguards is necessary pending the conclusion of the Computer III Further Remand Proceedings and establishes important protections for small ISPs that are not provided elsewhere in the Act.

135. Requiring section 272 affiliates for intraLATA information services. We decline to require the BOCs to provide intraLATA information services through section 272 affiliates. It is clear that section 272 does not require the BOCs to offer intraLATA information services through a separate affiliate. We further decline to exercise our general rulemaking authority to impose such a requirement. We conclude that the record in this proceeding does not justify a departure from our determination, in Computer III, to allow BOCs to provide intraLATA information services on an integrated basis, subject to appropriate nonstructural safeguards. Some parties in this proceeding argue that we should harmonize our regulatory treatment of intraLATA information services provided by the BOCs with the section 272 requirements imposed by Congress on interLATA information services.[314] We invite these parties to comment on these matters in response to the Further Notice we intend to issue in the Computer III Further Remand Proceedings.

136. Application of Computer II, Computer III, and ONA requirements to section 272 affiliate activities. We conclude that a BOC that provides interLATA telecommunications services and information services through the same section 272 affiliate may bundle such services without providing comparably efficient interconnection to the basic underlying interLATA telecommunications services.[315] Under our definition of "interLATA information service," as explained above, such service must include a bundled interLATA telecommunications element. Hence, to prohibit a BOC affiliate from bundling interLATA telecommunications and information services would effectively prevent the BOCs from offering any interLATA information services, a result clearly not contemplated by the statute. Further, we note that the market for information services is fully competitive,[316] and the market for interLATA telecommunications services is substantially competitive.[317] Thus, we see no basis for concern that a section 272 affiliate

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[312] CIX Reply at 8.

[313] First Interconnection Order at ¶ 995.

[314] See, e.g., U S West at 20-21.

[315] See NYNEX at 49.

[316] See, e.g., Computer II Final Order, 77 FCC 2d at 433, ¶ 128; Computer III Phase I Order, 104 FCC 2d at 1010, ¶ 95.

[317] See, e.g., Tariff Forbearance Order at ¶¶ 21-22; AT&T Nondominance Order, 11 FCC Rcd at 3278-3279, 3288, ¶¶ 9, 26; First Interexchange Competition Order, 6 FCC Rcd at 5887, ¶ 36.

providing an information service bundled with an interLATA telecommunications service would be able to exercise market power. If, however, a BOC's section 272 affiliate were classified as a facilities-based telecommunications carrier (i.e., it did not provide interLATA telecommunications services solely through resale), the affiliate would be subject to a Computer II obligation to unbundle and tariff the underlying telecommunications services used to furnish any bundled service offering.[318]

137. Under our current regulatory regime, a BOC must comply fully with the Computer II separate subsidiary requirements in providing an information service in order to be relieved of the obligation to file a CEI plan for that service. We decline to adopt NYNEX's proposal that we find that all BOC information services provided through a section 272 separate affiliate satisfy the Computer II separate subsidiary requirements, because we conclude that the record in this proceeding is insufficient to support such a conclusion.[319] Instead, we intend to examine this issue further in the context of the Computer III Further Remand Proceedings. Further, we reject USTA's argument that ONA reporting requirements do not extend to intraLATA information services provided through a section 272 separate affiliate.[320] BOCs must comply with the ONA requirements regardless of whether they provide information services on a separated or integrated basis.[321]

G. Information Services Subject to Other Statutory Requirements

1. Electronic Publishing (section 274)

a. Background

138. In the Notice, we observed that, although electronic publishing is specifically identified as an information service, interLATA provision of electronic publishing is exempt from section 272, and is instead subject to section 274.[322] Noting that we had initiated a separate proceeding to clarify and implement, inter alia, the requirements of section 274,[323] we sought comment on how to distinguish information services subject to the section 272 requirements from

[318] Frame Relay Order, 10 FCC Rcd at 13,719, ¶ 13.

[319] NYNEX at 48; see also U S West at 20.

[320] USTA at 15.

[321] See ONA Remand Order, 5 FCC Rcd at 7719.

[322] Notice at ¶ 51.

[323] See Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, Notice of Proposed Rulemaking, FCC 96-310 (rel. July 18, 1996) (Electronic Publishing NPRM).

electronic publishing services subject to the section 274 requirements.[324] We also invited parties to comment on whether, in situations involving services that do not clearly fall within either the definition of "electronic publishing" (section 274(h)(1)) or the enumerated exceptions thereto (section 274(h)(2)), we should identify as "electronic publishing" those services for which the carrier controls, or has a financial interest in, the content of information transmitted by the service.[325]

b. Comments

139. Several parties assert that the section 274(h)(1) definition of "electronic publishing" needs no further refinement because it is clear, when read in conjunction with the exceptions set forth in section 274(h)(2).[326] Several BOCs argue that the Commission should not develop another rule for classifying ambiguous services, but rather should handle them on a case-by-case basis.[327] Generally, the BOCs also resist the idea of applying a "financial interest or control" test to determine whether ambiguous information services are subject to section 272 or section 274;[328] in contrast, MCI supports adoption of such a test.[329] Several existing and potential competitors to the BOCs suggest that it may not be necessary to distinguish between information services subject to section 272 and electronic publishing services subject to section 274.[330]

c. Discussion

140. Upon review of the record and further consideration, we conclude that it is not necessary to adopt the "financial interest or control" test in determining whether a particular BOC service involves the provision of electronic publishing, in addition to the definitions set forth in sections 274(h)(1) and 274(h)(2). Generally speaking, if a particular service does not appear to fit clearly within either the definition of "electronic publishing," set forth in section 274(h)(1), or the exceptions thereto listed in section 274(h)(2), determining the appropriate classification of that service will involve a highly fact-specific analysis that is better performed on a case-by-case

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[324] Notice at ¶ 53.

[325] Id. This "financial interest or control" test is derived from the MFJ definition of "electronic publishing." See United States v. Western Electric, 552 F. Supp. at 178, 181.

[326] See, e.g., Ameritech at 70; USTA at 17-18; Ameritech Reply at 36; cf. MFS at 17.

[327] See e.g., Bell Atlantic, Exhibit 1, at 6; PacTel at 15-16; see also NYNEX at 46 (classification of services as electronic publishing should be done in Electronic Publishing proceeding).

[328] PacTel at 14-15; Ameritech at 70-71. But see U S West at 15 (test should be the BOC's ability to control the content of information provided to end-users).

[329] MCI at 21.

[330] ITAA at 15-16; AT&T Reply at 4 n.7.

basis. In the context of such a case-by-case determination, the Commission may consider a number of factors, including whether the BOC controls, or has a financial interest in, the content of information transmitted to end-users.[331] We also note that the definition of electronic publishing, as well as specific services encompassed by that definition, may be further refined in the Electronic Publishing proceeding.

141. We also decline to adopt ITAA's suggestion that, because of potential difficulties in distinguishing between information services and electronic publishing services, we should impose substantially the same separate affiliate requirements on both.[332] Such an approach would be directly contrary to the statute.[333] Congress set forth distinct separate affiliate and nondiscrimination requirements in sections 272 and 274, and specified that the former apply to interLATA information services, while the latter apply to all BOC-provided electronic publishing services. To impose the section 272 requirements on electronic publishing services, or to impose the section 274 requirements on interLATA information services, would be inconsistent with the clear statutory scheme.

142. Moreover, we specifically reject AT&T's contention that electronic publishing services are subject to the section 272 separate affiliate requirements, pursuant to section 272(a)(2)(B), which imposes a separate affiliate requirement on interLATA telecommunications services.[334] Electronic publishing services, however, are specifically included within the statutory definition of information services.[335] Accordingly, electronic publishing services would be subject to section 272(a)(2)(C), which imposes a separate affiliate requirement on interLATA information services, except that section 272(a)(2)(C) specifically exempts "electronic publishing (as defined in section 274(h))."

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[331] The Commission may also consider whether the BOC has "generated or altered" the content of information provided to end-users, as Ameritech suggests. See Ameritech Reply at 37.

[332] ITAA at 15-16.

[333] Accord Bell Atlantic Reply at 18-19.

[334] AT&T Reply at 4 n.7.

[335] 47 U.S.C. § 153(20).

2. Telemessaging (section 260)

a. Background

143. In the Notice, we tentatively concluded that "telemessaging" is an information service.[336] We further tentatively concluded that BOC provision of telemessaging on an interLATA basis is subject to the section 272 separate affiliate requirements, in addition to the section 260 safeguards.[337]

b. Comments

144. In general, parties agree with our tentative conclusions that telemessaging is an information service, and that when a BOC provides telemessaging on an interLATA basis, it must do so in accordance with the section 272 separate affiliate requirements.[338] Several parties also assert that, with respect to interLATA telemessaging services, it is possible to apply both section 260 and section 272 simultaneously.[339] PacTel, however, disagrees with both of our tentative conclusions, arguing that because "telemessaging" includes live operator services that are not information services, it constitutes a distinct category of service that is subject only to the section 260 requirements.[340]

c. Discussion

145. Based on our review of the comments and analysis of the statute, we hereby adopt our tentative conclusion that telemessaging is an information service. We reject PacTel's contention that live operator services do not constitute information services. Under the statute,

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[336] Notice at ¶ 54. The 1996 Act defines "telemessaging" as "voice mail and voice storage and retrieval services, any live operator services used to record, transcribe, or relay messages (other than telecommunications relay services), and any ancillary services offered in combination with these services." 47 U.S.C. § 260(c). LECs must provide telemessaging services in compliance with section 260, which is the subject of a separate proceeding. See Electronic Publishing NPRM.

[337] Notice at ¶ 54.

[338] Bell Atlantic, Exhibit 1, at 5; BellSouth at 25 n.61; AT&T at 12 n.13, 14-15; Sprint at 16-17 n.12; see also ITAA at 15.

[339] ITAA at 15; see also MCI Reply at 12.

[340] PacTel at 16; PacTel Reply at 9; see also MCI at 21-22 (questioning whether live operator services can be considered "information services"). But see MCI Reply at 12 (conceding that live operator services constitute information services).

live operator services "used to record, transcribe, or relay messages" are telemessaging services.[341] Because these functions plainly provide "the capability for . . . storing . . . or making available information" via telecommunications, we conclude that live operator telemessaging services fall within the statutory definition of information services.[342] We also adopt our tentative conclusion that BOCs that provide telemessaging services that meet the definition of interLATA information services must do so in accordance with the section 272 requirements, in addition to the section 260 requirements.[343]

IV. STRUCTURAL SEPARATION REQUIREMENTS OF SECTION 272

A. Application of the Section 272(b) Requirements

146. Section 272(b) of the Communications Act establishes five structural and transactional requirements for separate affiliate(s) established pursuant to section 272(a). We address each of the requirements below, with the exception of section 272(b)(2), which we discuss in the Accounting Safeguards Order.[344]

B. The "Operate Independently" Requirement

1. Background

147. Section 272(b)(1) states that a separate affiliate "shall operate independently from the BOC."[345] The Act does not elaborate on the meaning of the phrase "operate independently." We stated in the Notice that under principles of statutory construction, a statute should be interpreted so as to give effect to each of its provisions.[346] We therefore tentatively concluded that the section 272(b)(1) "operate independently" provision imposes requirements beyond those contained in subsections 272(b)(2)-(5).

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[341] 47 U.S.C. § 260(c). In general, these services involve live operators that answer calls intended for unavailable end-users, transcribe messages, and relay them to the end-user. Live operator services are often used in health care contexts, where "person-to-person" communication is important. See ATSI at 2.

[342] As discussed above at ¶ 103, live operator services do not appear to fall within the Commission's definition of "enhanced" services, because they do not employ "computer processing applications." Thus, they are an example of one area in which the "information service" definition is broader than that of "enhanced services."

[343] One example of an telemessaging service that is an interLATA information service might be a voicemail service that is bundled with a personal 800 number, offered to the customer for a single price. See NYNEX at 44.

[344] Accounting Safeguards Order part IV.B.1.c.

[345] 47 U.S.C. § 272(b)(1).

[346] Notice at ¶ 57.

148. As we observed in the Notice, section 274(b) contains similar language to section 272(b)(1). It states that "[a] separated affiliate or electronic publishing joint venture shall be operated independently from the [BBC]." Subsections 274(b)(1)-(9) list several requirements that govern the relationship of an electronic publishing entity and the BBC with which it is affiliated.[347] We sought comment on the relevance of the "operated independently" language of section 274(b) when construing the "operate independently" requirement of section 272(b)(1).[348]

149. In addition, we sought comment on what rules, if any, we should adopt to implement the requirements of section 272(b)(1).[349] Moreover, we asked whether we should impose one or more of the separation requirements established in the Computer II or Competitive Carrier[350] proceedings.[351]

150. In the Computer II proceeding, the Commission required AT&T to provide enhanced services through a separate affiliate, a requirement that the Commission extended to the BOCs following divestiture.[352] The Commission required the enhanced services subsidiary to "have its own operating, marketing, installation and maintenance personnel for the services and equipment it offer[ed]," [353] to comply with information disclosure requirements, and to maintain its own books of account.[354] The Commission prohibited the regulated entity and its enhanced services subsidiary from using in common any leased or owned physical space or property on which transmission equipment or facilities used in basic transmission services were located,[355] barred them from sharing computer capacity, and limited the regulated entity's ability to provide software to the affiliate.[356] Moreover, the Commission barred the enhanced services subsidiary

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[347] 47 U.S.C. § 274(b).

[348] Notice at ¶ 60.

[349] Id. at ¶ 57.

[350] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof, CC Docket No. 79-252, Fifth Report and Order, 98 FCC 2d 1191, 1198 (1984) (Competitive Carrier Fifth Report and Order).

[351] Notice at ¶ 59.

[352] BOC Separations Order, 95 FCC 2d 1117 (1983).

[353] Computer II Final Order, 77 FCC 2d at 477, ¶¶ 238-39.

[354] Id. at 476, 480-81, ¶¶ 236, 245-49.

[355] Id. at 477-78, ¶ 240.

[356] Id. at 478-80, ¶¶ 241-44; Computer II Reconsideration Order, 84 F.C.C.2d at 81, ¶ 91 (requiring affiliate or its outside contractors to perform all software development, other than generic software embodied in equipment sold to any interested purchaser).

from constructing, owning, or operating its own transmission facilities, thereby requiring it to obtain such facilities from a local exchange carrier pursuant to tariff.[357]

151. In the Competitive Carrier proceeding, the Commission prescribed the separation requirements to which independent LECs must conform to be regulated as nondominant in the provision of domestic, interstate, interexchange services. Specifically, an independent LEC must provide interstate interexchange services through an affiliate that:
1) maintains separate books of account; 2) does not jointly own transmission or switching facilities with its affiliated exchange telephone company; and 3) acquires that exchange telephone company's services at tariffed rates and conditions.[358]

2. Comments

152. Relationship of Section 272(b)(1) to Section 274(b)(1). Several commenters rely on the rule of statutory construction that similar terms in related parts of an act should be read similarly.[359] Two such commenters propose that the requirements listed under both sections 272(b) and 274(b) define the term "operate independently," and, consequently, that the additional prohibitions of subsection 274(b) must be read into subsection 272(b).[360] In contrast, several BOCs cite the doctrine of inclusio unius est exclusio alterius, the "inference [applied in statutory construction] that all omissions should be understood as exclusions."[361] They argue that, because Congress required electronic publishing affiliates and joint ventures to be "operated independently" and then imposed additional restrictions on activities that are not explicitly restricted in section 272(b), those activities cannot be barred by the "operate independently" provision of section 272(b).[362] Other commenters focus on the structural differences between the two subsections as evidence that we should construe "operate independently" and "operated independently" differently.[363]

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[357] Computer II Final Order, 77 FCC 2d at 474, ¶ 229.

[358] Competitive Carrier Fifth Report and Order, 98 FCC 2d at 1198.

[359] ITAA at 17-18 & n.49; MCI at 26-27; PacTel at 21; U S West at 29 n.43.

[360] ITAA at 17-18 & n.49; MCI at 26-27. Contra U S West at 29 n.43 (citing same rule of statutory construction to argue that provision is used as summary language in both sections).

[361] See 2A Norman J. Singer, Statutes and Statutory Construction § 47.23 (5th ed. 1992).

[362] E.g., Ameritech Reply at 11; BellSouth at ii, 30; BellSouth Reply at 19; PacTel at 21; see also YPPA Reply at 3-4.

[363] See AT&T Reply at 17 & n.40; SBC Reply at 20 n.33; Letter From David F. Brown, Attorney, SBC, to Regina Keeney, Chief, Common Carrier Bureau, at 4-5 (filed Nov. 14, 1996) (SBC Nov. 14 Ex Parte). Contra U S West at 29 n.43.

153. Defining "operate independently." With the exception of NYNEX, the BOCs and USTA interpret the term "operate independently" to impose a straight-forward, descriptive requirement that needs no further clarification through the rulemaking process.[364] They generally contend that the omission of additional structural separation requirements in section 272(b) represents a deliberate congressional choice not to impose such restrictions.[365] They particularly oppose adoption of the Computer II structural separation requirements to implement the "operate independently" requirement. Indeed, they assert that adopting such restrictions would be inconsistent with congressional intent, as well as changes in the industry and common carrier regulation since the Computer II proceeding.[366] These commenters suggest that imposing additional structural separation requirements would result in a loss of efficiency and economies of scope, decreased innovation, and fewer new services.[367]

154. The majority of commenters, other than the BOCs, urge us to construe the "operate independently" requirement as imposing additional structural separation requirements.[368] For instance, the DOJ contends that additional structural separation requirements are the most effective means of reducing the risks of cross-subsidization.[369] Commenters supporting this view argue that the "operate independently" requirement must be read to impose, at a minimum, the structural separation rules established in the Computer II proceeding, including those elements outlined above.[370] Among those commenters, several emphasize that a BOC and its affiliate

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[364] See Ameritech at 38-39 (contending provision raises question of fact best evaluated on a case-by-case basis in the context of section 271 applications to provide in-region interLATA services); Ameritech Reply at 7; Bell Atlantic at 4; BellSouth at 28-30; PacTel at 20 (characterizing provision as "a 'gloss' on the other requirements"); PacTel Reply at 9-10; SBC at 7; U S West at 29; see also SBC Nov. 14 Ex Parte at 2-3 (reading the provision to impose a "qualitative 'piercing the corporate veil' standard"); USTA at 19-20; USTA Reply at 3, 6-7; YPPA at 5-6; YPPA Reply at 3.

[365] E.g., Ameritech at 38; Ameritech Reply at 10; Bell Atlantic at 5; BellSouth at 29-30; BellSouth Reply at 18; NYNEX Reply at 17-19; USTA at 18; U S West at 24; YPPA Reply at 2, 5-6.

[366] E.g. Ameritech Reply at 8-9 (citing interconnection, unbundling, and collocation obligations); NYNEX at 25; SBC at 12; USTA at 4, 18; USTA Reply at 4-5 (citing price cap regulation); U S West Reply at 6 (citing regime for pricing of interconnection).

[367] See, e.g., SBC at 13-17; USTA Reply at 4.

[368] E.g., AT&T at 20; CompTel at 13-14 (advocating "complete segregation of affiliate interexchange subsidiary"); Excel at 4-5; IDCMA at 3-4; LDDS WorldCom at 13 n.12; LDDS WorldCom Reply at 7; MCI at 23; MFS at 15-16; Ohio Commission at 8; Sprint at 19-20; Time Warner at 16-17; TRA at 13.

[369] DOJ Reply at 10 (providing example that sharing of all personnel should be prohibited).

[370] E.g., AT&T at 20-23 (contending that while some of those requirements are expressly mandated by the language of section 272, all of them -- as outlined above -- are necessary elements of operational independence); Excel at 5-7 (advocating all requirements except for requirement that affiliate maintain separate books); IDCMA at 4; ITAA at 18-19; ITI & ITAA Reply at 10-11; Ohio Commission at 9; Ohio Commission Reply at 4-5; Time Warner at 17-18 & n.30; Time Warner Reply at 14; see also TRA at 13 (urging us to use Computer II proceeding